

HUMAN SERVICES BOARD

INTRODUCTION

FINDINGS OF FACT

2. The petitioner and her husband buy their own health insurance. However, they have not obtained coverage for their children and on April 8, 2005 re-applied to DCF/ESD for health coverage through the Dr. Dynasaur program. The children have been covered by Dr. Dynasaur since their births.

3. On her application dated April 8, 2005, the petitioner reported that day care expenses for the children so the parents can work amounts to \$200 per month. In response to questions about her family's income, she referred DCF/ESD to the attached 1040 tax form for 2004.

4. The petitioner's 1040 tax form for 2004 showed that her family reported \$57,146 in gross income (which included \$46,379 in salary from her husband's self-employment, a capital gain of \$8,283 from the sale of livestock and \$3,339 in wages earned by the petitioner).

5. Because the 1040 form indicated income from a corporation that was partially owned by the petitioner's husband, DCF/ESD asked for copies of all the corporate tax forms in a written request dated April 26, 2005.

6. The petitioner complied with this request. The petitioner also reported that the 2004 tax forms did not represent her current income because she had lost her employment from the last year and now worked at a café. At DCF/ESD's request she produced pay stubs from the last thirty days showing that she had earned \$483.19 in her new waitress job.

7. After reviewing the forms, DCF/ESD sent a notice to the petitioner on May 13, 2005¹, informing her that her children were not eligible for Dr. Dynasaur due to excess income. The petitioner was notified of spend-down amounts which each child would have to meet in order to become eligible for benefits.

8. The petitioner appealed that decision, which appeal was received by the Board on June 22, 2005. A hearing was set for July 21, 2005. At the hearing the petitioner said she had no idea how DCF/ESD had calculated her income. The hearing officer raised the issue of whether the petitioner should be eligible for continuing benefits and asked the Department to respond to both questions forthwith. The petitioner was told that she could respond in writing to the Department's submissions and it was agreed that no further hearing would be scheduled as the tax forms spoke for themselves and the arguments were likely to be legal ones.

¹ The notice of decision was not dated but stated at the bottom that it was printed on June 20, 2005. The petitioner did not contest that it was actually sent when DCF/ESD claimed but a statement on the notice saying that it is "based on facts for June, 2005" raises doubts that it was sent in May. This is important because if the notice was sent in June, the petitioner's appeal was timely and she should have received continuing benefits. Since this decision does not award retroactive benefits to the petitioner, there is no remedy for that error at this point. DCF/ESD should be aware, however, that if this appeal had been in favor of the petitioner, this mistake or disregard of the continuing benefits rule not only would have created a great hardship for the family but would also have violated their due process rights under DCF/ESD's own rules.

9. On July 26, 2005, DCF/ESD responded first that the decision denying Dr. Dynasaur had been mailed on May 13, 2005 and that no appeal was filed until June 10, 2005.² DCF/ESD determined that since the appeal was not filed within ten days or at least before the termination action was taken at the end of the month, that benefits could not be continued.

10. DCF/ESD responded with regard to how the calculation of monthly income was made as follows:

- (1) From Form 4797 "Sales of Business Property", a capital gain of \$8,283 was used as regular income. The petitioner does not dispute the inclusion of this income as the family itself listed this as income on the Form 1040. The petitioner also agreed that this type of capital gain was likely to occur again during the present year.
- (2) Instead of using the income paid to her husband from the business, reported as \$46,379, DCF looked at Schedule F "Profit or Loss From Farming" which showed that the closely held corporation actually had a gross income of \$594,776. From that amount DCF subtracted the full amount of business expenses listed on the form, for a total of \$231,340. As the petitioner's husband owned a 34.5 percent interest in the business, that net farm profit was calculated for him as \$79,812.30. That amount was further reduced by the husband's share of the depreciation on business equipment which was listed on form K-1 as \$28,915. The final net, \$50,897.30 was divided by twelve months for a total countable income from the dairy farm business of \$4,241.44 per month.

² It is of concern that an appeal filed on the 10th of the month with OVHA did not reach the Board for twelve days.

- (3) The final figure used in the calculation was the petitioner's verified current income of \$483.19 per month.
- (4) All of this income was added together and subjected to a \$90 work deduction for each parent and \$200 for child care expenses. The total monthly countable income after deductions was determined to be \$5,034.88.

11. The petitioner responded to DCF/ESD's explanation of how its income was calculated in a letter dated August 4, 2005 but which was lost in the mail. The hearing officer wrote the petitioner on September 22, 2005 saying that she had not received her response and the petitioner provided a new copy of that letter on September 23, 2006. The petitioner refutes the figures used by DCF/ESD for the following reasons:

- (1) Her actual income from working at the café is usually between \$350 to \$400 per month, but no verification of that amount was offered.
- (2) Her husband is not able to take out all of his share of the profit from the business and actually is paid only \$2,870 per month in income. The rest of the profit is reinvested in the business.
- (3) DCF did not give the family deductions listed on their individual tax return for personal payments into an IRA of \$2,000, for payment of a self-employment tax of \$3,277 and for payment of health insurance premiums equaling \$7,548.
- (4) The family's child care expenses are actually \$430 per month, not \$200, although no verification of that amount was offered.

- (5) The petitioner did not dispute DCF's contention that she should not have received continuing benefits due to a late filing of the appeal.

12. The hearing officer asked DCF/ESD to provide all the notices and tax documents it relied upon to make its decision. Those were provided on November 18, 2005.

13. On November 22, 2005, the hearing officer wrote to the petitioner telling her that she wanted to give her an opportunity to respond to the documents provided by DCF/ESD and to DCF/ESD's contention that 34.5 percent of the farm's profit was available to the family as her husband's self-employment income. It was suggested that the petitioner provide a copy of any contract or written agreement which might exist restricting partners from taking their full share of profit from the farm income and any methods that might be available to change that situation.

14. The petitioner responded on December 5, 2005 that such a response would require a meeting of the partners, that one of the other partners was able to get Dr. Dynasaur without all of these problems, and that she thought another meeting with DCF/ESD to go over the figures again would be helpful. The hearing officer responded on December 12, 2005 that DCF/ESD could review the case again with any new information she wished to submit but that she still needed to

provide evidence regarding the family's ability to access their profit from the farm for purposes of this hearing and was given until the end of December to provide such information.

15. No information was provided by the end of December or, indeed, by the end of January, as the record was left open to accommodate a possible late submission by this pro se appellant.

16. As the petitioner has provided no information that access to the profit is restricted, it must be assumed that the income available from the business is \$4,241.44 per month which is the figure listed on the business tax forms as the petitioner's share of the net profit, less depreciation. When added to the only verified amount of the petitioner's income of \$483.19 per month, plus the recurring capital gain of \$8,283 (\$690.25 monthly), it must be found that the family's gross monthly countable income (before applicable Medicaid deductions) at the time of their April 2004 application was \$5,414.88.

ORDER

The decision of DCF/ESD is affirmed with regard to its initial determination of the family's ineligibility for Dr.

Dynasaur. However, the matter is remanded to allow the petitioner to show verification of changes in her income and child care expenses since the original application which were alluded to throughout this appeal and were apparently not reassessed by DCF/ESD.

REASONS

The facts agreed to in this appeal were based on the petitioner's April 2005 application, the tax forms she supplied and her May 2005 verification of her new income. The primary focus of the petitioner's argument was that DCF/ESD was incorrect to use the net profit from her husband's share of the dairy farm as his self-employment income rather than the salary he actually paid himself.

In determining eligibility for the Medicaid program for children under 18 years of age (the Dr. Dynasaur program, M302.26), the regulations require the inclusion of "earned income . . . or profit from activities in which the individual is engaged as an employed or self-employed person." M352. The regulations further provide that:

Earned income is defined as income prior to any deductions for income taxes, FICA, insurance or any other deductions voluntary or involuntary except that, in determining earned income for self-employed individuals, business expenses are deducted first.

Earnings over a period of time, for which settlement is made at one given time, are also included; i.e. sale of farm crops, livestock, poultry, etc.

M352

Under these regulations, countable gross income must be verified and the preferred method for verification for persons self-employed in a farming business is tax returns and business records. M352 and M352.2. Persons who are self-employed are allowed to deduct their business expenses as set forth in the following regulation:

Business expenses, which are deducted from gross receipts to determine adjusted gross earned income, are limited to **operating costs necessary to produce cash receipts**, such as:

1. Office or shop rental; taxes on farm or business property; and
2. Hired help; and
3. Interest on business loans; and
4. Cost of materials, stock, and inventory, livestock for resale required for the production of this income.

However, items such as personal business and entertainment expenses, personal transportation, purchase of capital equipment and payment on the principal of loans for capital assets or durable good, are **not** business expenses.

Depreciation is an allowable business expense in determining the eligibility of a child under the age of 18 . . .

M352.2 (Emphasis added.)

In this matter, the tax forms from the dairy business presented by the petitioner showed that her husband had a **profit** from his share of the business of \$79,812.30 after all IRS expense deductions, which are the same kinds of deductions listed in the above regulation, were subtracted. DCF/ESD allowed every one of the business expenses claimed on the IRS forms as well as the petitioner's share of the depreciation expense. The petitioner has not made any argument that there were other expenses relating to operating costs necessary to produce cash receipts that DCF/ESD failed to deduct.

In spite of the petitioner's contention to the contrary, the regulations do not count only that income which a self-employed person decides to pay himself out of his profit. Although the petitioner claimed that her husband does not have access to his share of the profits, she presented no evidence of this fact in spite of the provision of ample opportunity for her to do so.

Once a countable gross income is achieved for an applicant, the regulations allow a further deduction of \$90 for each employed person and up to \$175 dependent care deduction for each child over the age of two to allow the parents to work. M352.1, 352.3, and 352.4. The petitioner

and her husband each were given the \$90 deduction. The petitioner reported on her signed application that she spent \$200 per month on her children's day care expenses. DCF/ESD gave her that deduction.

Those deductions (\$380 total) taken from the family's gross income of \$5,414.88 (the petitioner's verified monthly income of \$483.19, the husband's self-employment income of \$4,241.44 (\$50,897.30 divided by 12) and the couple's recurring capital gain of \$8,283, \$690.25 per month) resulted in a countable income of \$5,034.88. The maximum income for a family of four in the program in April of 2005 was \$4,838. P-2420B. The petitioner's income was in excess of that amount, although not by a large amount. Because the petitioner asked for a meeting with DCF/ESD to discuss changes, because that meeting apparently never occurred, and because the alleged changes could have made a difference in the family's eligibility, the matter should be remanded to see if changes during the pendency of this appeal might have caused the family to be eligible at some point during the year.

DCF/ESD's decision that the petitioner's family was not eligible during their review last April due to the counting of the entire farm profit was correct under its regulations

and must be upheld by the Board. 3 V.S.A. § 3091(d), Fair Hearing Rule 17. Should DCF/ESD determine upon remand that the petitioner did become eligible at some subsequent time due to either a decrease in her income or an increase in her child care expenses, the petitioner should be aware that she will be reviewed again shortly and the same issues will arise. If the petitioner does not want her husband's entire share of the profit counted towards her children's eligibility, she will still need to present evidence that he does not have access to that profit.

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